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Report of the Special Rapporteur on the independence of judges and lawyers*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, prepared pursuant to Council resolution 26/7. The report is the first submitted by the Special Rapporteur since his appointment on 5 December 2016.

In the report, the Special Rapporteur presents his perspective on the mandate. In doing so, he recalls the origins of the mandate and its framework, and the role of the Special Rapporteur. He then presents an overview of the thematic work of his predecessors. Finally, he presents a few specific issues of concern that he will pay particular attention to during his tenure, particularly the issue of corruption and organized crime.

* The present document was submitted late so as to reflect the latest information.

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I. Introduction

1. The present report is the first submitted by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, since his appointment in December 2016 pursuant to Human Rights Council resolution 26/7. In his report, the Special Rapporteur establishes the main issues he will prioritize during his tenure. It consists of three parts. The first section provides an overview of the mandate and its methods of work with States, civil society, United Nations bodies and relevant stakeholders. The second part provides a summary of the thematic work of previous Special Rapporteurs. The third part identifies some issues of specific concern that the Special Rapporteur will take into account during his mandate, particularly issues related to corruption and organized crime, among others.

2. The Human Rights Council, aware of the connection between human rights and the independence of judges and lawyers, has repeatedly underlined the importance of an independent judiciary. In resolution 29/6, the Council reiterated the conviction that an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are essential prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination.

3. The Human Rights Council has repeatedly requested the Secretary-General, within the limits of the regular budget of the Organization, to provide the Special Rapporteur with all the necessary human and financial resources for the effective fulfillment of his or her mandate.[1]

4. The Special Rapporteur would like to thank the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa for its outstanding support in the research for and drafting of the present report.

II. Perspectives on the mandate of the Special Rapporteur on the independence of judges and lawyers

5. The Special Rapporteur would like to acknowledge the outstanding work done by his predecessors in this position, Mónica Pinto, Gabriela Knaul, Leandro Despouy and Param Cumaraswamy.

6. The mandate of the Special Rapporteur on the independence of judges and lawyers has been gradually built over the years thanks to the interpretation of its scope and content, enshrined most recently in Human Rights Council resolution 29/6. As the Special Rapporteur stated in 2016, each Special Rapporteur, in his or her own field of action, has helped through the periodic thematic reports to clarify and consolidate the requirements necessary to achieve and maintain the independence and impartiality of the justice system.

7. The present Special Rapporteur intends to perform his task taking into consideration the valuable work of his predecessors while addressing specific topics of current relevance. For example, during the course of his tenure the Special Rapporteur would like to focus his attention on the impact of corruption, organized crime and other transnational threats on the judiciary. The Special Rapporteur will elaborate on this issue in his future thematic reports.

8. Upon review of the approach of previous mandate holders on the issue of corruption (see, for instance, E/CN.4/2002/72/Add.1, A/HRC/4/25, A/HRC/11/41, A/64/181, A/65/274, A/HRC/20/19, A/67/305, A/HRC/23/43 and Corr.1 and A/70/263), the Special Rapporteur is of the view that the impact of corruption and organized crime on the judiciary needs to be considered in further detail. During his term in office, the Special Rapporteur will work closely with States, United Nations agencies and bodies, national human rights

[1] See, for instance Council resolution 26/7.

institutions, academia and civil society organizations to elaborate strategies and approaches aimed at preventing the harmful influence of corruption and organized crime on the judiciary.

A. Mandate of the Special Rapporteur on the independence of judges and lawyers

1. Origins of the mandate and commitment of the international community

9. The mandate of the Special Rapporteur on the independence of judges and lawyers is derived from the concern expressed by the Commission on Human Rights at the frequency of attacks on judges, lawyers and court officials and the link it noted existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of human rights violations. It was established in resolution 1994/41 and last renewed by the Human Rights Council in resolution 26/7. In the first report of the mandate (E/CN.4/1995/39), the Special Rapporteur provided a detailed historical background in order to situate the mandate in the context of the considerable work which had been accomplished up until that time in elaborating international standards and seeking full respect for them. This historical background was recalled in a later report of the Special Rapporteur to the Human Rights Council (A/HRC/32/34).

10. A solid international legal framework supports the purpose of the mandate. International and regional instruments relating to the scope of the mandate were first listed by the Special Rapporteur in his first report and interpreted, contextualized and applied by the successive mandate holders over more than 20 years. New instruments, such as the Rome Statute of the International Criminal Court, the United Nations Convention against Corruption and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and references to the jurisprudence of regional human rights courts and United Nations treaty bodies later joined this original listing. The Special Rapporteur will continue referring to and applying these standards in his work and will advocate for their dissemination and full implementation. In this context, it will be essential to recall that the requirements of independent and impartial justice are universal and that the general practice of providing independent and impartial justice constitutes an international custom in the sense of article 38 (1) (b) of the Statute of the International Court of Justice (see E/CN.4/1995/39, paras. 32 and 35).

2. Role of the Special Rapporteur and methods of work

11. The work of the Special Rapporteur on the independence of judges and lawyers is rich and complex as the scope of the mandate is rather extensive, encompassing issues such as access to justice, the independence and impartiality of the judiciary and the proper functioning of the justice system, the protection of individual judges, lawyers, prosecutors and court officials, and the right to a fair trial and due process of law.

12. To discharge his duties, the Special Rapporteur will follow the working methods established by his predecessors as well as by the special procedures of the Human Rights Council, and he intends to contribute to future discussions on how to improve these methods of work, including through participation in the annual meeting of special procedure mandate holders.

13. The Special Rapporteur wishes to underline that cooperation is essential for the discharge of the mandate, whether it be to carry out country visits, prepare thematic reports or gather information on cases or situations of concern. For this reason, he intends to establish and maintain direct contact with Member States, United Nations agencies and bodies, other special procedure mandate holders, professional associations of judges, lawyers and prosecutors, national human rights institutions, civil society organizations, academia and other relevant stakeholders throughout his tenure. The Special Rapporteur is convinced of the need to strengthen multilateral cooperation and coordination to address problems concerning the independence of judges and lawyers.

3. Rule of law, separation of powers and the independence of judges and lawyers

14. Judicial independence is fundamental for the protection of human rights, democracy and the rule of law. In 1985, the General Assembly endorsed the Basic Principles on the Independence of the Judiciary. That independence, as stated by the Basic Principles, shall be guaranteed by the State and enshrined in the Constitution or the law of the country.

15. The Human Rights Council and its predecessor, the Commission on Human Rights, have highlighted in numerous resolutions the importance of an independent and impartial judicial system to uphold the rule of law, democracy and human rights.[2] Rule of law must be understood by virtue of the fact that, in democratic societies, people are equal under the law and no one can be above it.

16. The Special Rapporteur is convinced that respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy. However, independence of the judiciary cannot provide carte blanche to judges. They must act in accordance with the principles set out by the rule of law, democracy and the separation of powers.

17. Regarding the independence of lawyers, the Special Rapporteur fully endorses and supports the Basic Principles on the Role of Lawyers, which represent the most comprehensive international normative framework aimed at safeguarding the right of access to legal assistance and the independent functioning of the legal profession (see A/71/348, para. 22). They provide that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them at all stages of criminal proceedings. They also list the measures that Member States should adopt to ensure access to lawyers and legal services and establish several safeguards for the professional functions of lawyers and their security.

4. Towards an agenda for implementation

18. Several decades after the creation of the mandate, the entry into force of the International Covenant on Civil and Political Rights and the adoption of the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, the most fundamental human rights related to the independence and impartiality of the justice system are still blatantly violated on a daily basis around the world.

19. The Special Rapporteur wishes to call on Member States and the international community to renew their efforts to disseminate the content of these instruments and other international standards relating to the independence of judges, lawyers and prosecutors, and to adopt urgent measures aiming at their full implementation. These measures shall include the swift transposition of international law into domestic law for States functioning under a strictly dualist system. They shall also include awareness-raising and training of judges, lawyers and prosecutors on the content and application of international norms at the domestic level for States functioning under a monist system. Awareness-raising and training on the jurisprudence of regional courts on the subject, when applicable, should also be undertaken.

20. As underlined in the Vienna Declaration and Programme of Action, the administration of justice, including law enforcement and prosecutorial agencies and especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.

21. A positive example of the incorporation of international norms and standards can be seen in the Inter-American human rights system. The incorporation of the jurisprudence of the Inter-American Court of Human Rights by constitutional and supreme courts in Latin America is consolidating important democratic standards for the action in the national

[2] See, for instance, Council resolutions 29/6 and 31/2.

courts, including the rights to judicial protection and fair trial, due process and independence of the judiciary.

22. The Special Rapporteur will come back to the issue of setting up a clear agenda for the effective implementation of international instruments related to the independence of the justice system, including via the application of international law and jurisprudence in domestic courts, in future report.

B. Overview of the thematic work accomplished since the establishment of the mandate

23. The issues and situations addressed by the successive mandate holders were complex and often interrelated, each with its own importance if the justice system is to fulfil its role in the protection of human rights in an independent, impartial and fair manner. In the section below, the Special Rapporteur provides a review of this wealth of work, with a view to taking stock of achievements and identifying questions, problems and challenges which should frame his work, and on which he intends to focus his efforts.

1. Judicial independence

24. Article 10 of the Universal Declaration of Human Rights protects judicial independence. This is an obligation to be guaranteed and not a privilege that States may grant. The Basic Principles on the Independence of the Judiciary deal with the following subjects: (a) independence of the judiciary; (b) freedom of expression and association; (c) qualifications, selection and training; (d) conditions of service and tenure; (e) professional secrecy and immunity; and (f) discipline, suspension and removal.

25. The United Nations system has highlighted the importance of integrity and independence of the justice sector in many resolutions,[3] as well as of the fight against corruption. Building on these efforts, in 1997 the Special Rapporteur noted that attacks on the independence of judges and lawyers were not confined to developing countries. Therefore, he underscored the universality of the threat to the independence of judges and lawyers and the need for constant international vigilance (see E/CN.4/1997/32, para. 190).

26. In 2004, after having reviewed the work of his predecessor, the Special Rapporteur noted that the independence of judges and lawyers was at risk throughout the world, although to varying degrees and for reasons or in forms that are sometimes quite different (E/CN.4/2004/60, p. 11).

Requirements and conditions of judicial independence

27. In his first report to the Commission on Human Rights, the Special Rapporteur noted that, with regard to some issues, reiteration might be necessary in relation to the principle of the separation of powers, which is the bedrock upon which the requirements of judicial independence and impartiality are founded (see E/CN.4/1995/39, para. 55).

28. The mandate of the Special Rapporteur is not limited to defending individuals engaged in a judicial activity, but includes looking into the individual attributes and institutional conditions necessary to an independent and impartial justice for the benefit of the consumers of justice rather than a privilege of the judiciary for its own sake (see E/CN.4/2004/60, para. 27).

29. The Special Rapporteur has reiterated the misconception or misunderstanding often prevailing around the function of judicial review, or its equivalent, of the constitutionality or legality of executive decisions, administrative orders and legislative acts. The process of judicial review serves to check executive and legislative excesses by upholding the rule of law, noting that in principle this is not a matter of substitution of functions (see E/CN.4/1995/39, para. 56).

[3] See, for instance, paragraph 15 of resolution 5/4 and paragraph 5 of resolution 6/6 of the Conference of the States Parties to the United Nations Convention against Corruption.

30. It has been established that the desire to restrict or even suspend judicial review (or its equivalent) of the constitutionality or legality of executive decisions and administrative acts and laws would be tantamount to impairing the independence of justice (see E/CN.4/2004/60, para. 29).

31. In a 2016 report, the Special Rapporteur underscored that legislative activity lacks effectiveness if there is no commitment to respect and enforce it. Moreover, whenever Governments, political and economic actors, judges, lawyers and prosecutors do not behave according to the specific roles they have to play in a democratic society, the prerequisites of independence become difficult to fulfil (see A/HRC/32/34, para. 39).

Institutional safeguards

32. In a comprehensive report submitted in 2009 (A/HRC/11/41), the Special Rapporteur highlighted the features having an impact on the independence of the judiciary as an institution: the separation of the judicial function from other branches of power as prerequisite; the guarantee of independence at the constitutional level; the selection and appointment process; the prohibition of ex post facto tribunals; judicial budget; freedom of association and expression; the assignment of court cases; independence within the judiciary and investigations into allegations of improper interference.

33. The Special Rapporteur established early on that the independence and impartiality of the judiciary can be effectively secured if there is in the State a well-entrenched independent mechanism responsible for the appointment, promotion, transfer and dismissal of judges (see E/CN.4/1995/39, para. 65).

34. The Special Rapporteur has also underlined that it is important for the judiciary to have a sufficient operating budget and financial autonomy vis-à-vis the executive and legislative powers, and that budgetary independence had to be accompanied by an effective external audit (see E/CN.4/1996/37, para. 32).

Individual conditions

35. In a 2009 report, the Special Rapporteur also identified important parameters to effectively guarantee the individual independence of judges: tenure and irremovability; immunity; promotion and conditions of service, including judicial salary; human and material resources and security and training. The Special Rapporteur had also noted earlier that, in addition to the traditional safeguards necessary to secure judicial independence, the character, qualifications and independence of the individual appointee make an important difference (see E/CN.4/1996/37, para. 92).

36. In several thematic reports, concerns were expressed regarding the problem of judges appointed on a provisional basis without security of tenure. As was noted, such appointments could become a serious threat to the independence of the judiciary, as provisional or temporary judges are vulnerable to executive interference and even tensions within the judiciary (see E/CN.4/1998/39, para. 183).

Justice and the judiciary in a period of transition

37. From the beginning of the mandate, the Special Rapporteur has paid special attention to countries undergoing transition to democracy, since their needs were generally considerable and positive steps early in their transition would contribute significantly to achievement of the rule of law, respect for human rights and peace and prosperity (see E/CN.4/1995/39, para. 12). Special mention was made, in particular, of the understanding and respect for the principle of separation of powers as a sine qua non ingredient for democratic States and which is, therefore, of cardinal importance for countries in transition to democracy (ibid., para. 55).

38. In previous reports the Special Rapporteur has expressed concern about the problems faced by countries in transition in providing an independent and impartial justice system, in particular the lack of financial resources, the lack of human resources and of infrastructure (E/CN.4/1998/39, para. 184).

39. In transition processes, whether post-conflict or post-authoritarian, it is normal to hold to account judges involved in human rights violations and corruption who wish to retain their posts. Even in such cases, the Special Rapporteur properly underscored that international standards for a fair trial and the Basic Principles on the Independence of the Judiciary must be strictly observed in all circumstances (see E/CN.4/1996/37, para. 41).

40. Noting the dilemmas authorities may face during periods of transition, especially with regard to the prosecution of human rights violations, crimes and abuses committed by members of a regime that may have appointed them, the Special Rapporteur stated that one priority of a country in transition to peace or democracy may be to "clean up" its judiciary in order to restore its legitimacy, independence and impartiality, and ultimately its public credibility (see E/CN.4/2005/60, para. 44). To avoid arbitrariness, abuse and the settlement of scores, he underlined that the dismissal of judges or their reappointment through a new selection process must fully respect international standards for a fair trial and the Basic Principles on the Independence of the Judiciary (ibid., para. 45).

2. Judicial ethics, corruption within the judiciary and judicial accountability

41. In previous reports, the Special Rapporteur has noted that threats to judicial independence came not only from the executive or legislative branches, but also from organized crime, businesses, corporate giants and multinationals (see E/CN.4/1996/37, para. 246). The present mandate holder takes particular note of how organized crime and corruption are increasingly affecting the capacity of many States and the judiciary to fulfil their duties. How these manifest and recommendations to address this growing phenomenon will be an issue of special concern in forthcoming reports.

Judicial integrity and accountability

42. The formulation of judicial codes of ethics and the establishment of judicial complaints mechanisms composed only of sitting and/or retired judges has been mentioned as a process to be promoted (see E/CN.4/2002/72, para. 37). The Bangalore Principles of Judicial Conduct were annexed to the annual report of the Special Rapporteur in 2003 (E/CN.4/2003/65) to stress this approach. The issues of judicial integrity and judicial accountability were also addressed by the Special Rapporteur in two reports (A/67/305 and A/HRC/26/32). In the latter, she noted that judicial accountability must never be used to arbitrarily undermine the independence of judges and, for that reason, any accountability mechanisms must follow procedures that are in line with international standards of due process of law and fair trial.

Judicial corruption

43. In the past, the Special Rapporteur drew attention to the growing concerns about judicial corruption (see E/CN.4/2000/61 and Corr.1, para. 29). He noted a need to devote greater attention to promoting judicial integrity and accountability, which would strengthen judicial independence and public confidence in the judiciary (see E/CN.4/2001/65, para. 28). He also noted that judicial accountability had become an issue of importance in several countries, leading to tensions between Government and the judiciary.

44. Early in the mandate, the Special Rapporteur explained that corruption within the judiciary went far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary or bribes. It could, for instance, take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage. An important issue of concern for the Special Rapporteur relates to the pressure and direct action carried out by organized crime against the judiciary to influence the decisions of judges, lawyers and prosecutors. A lack of trust in the judiciary is lethal for democracy and development and encourages the perpetuation of corruption (see E/CN.4/1996/37, paras. 39-40).

45. In a full report devoted to the issue of judicial corruption (A/67/305), the Special Rapporteur looked into the specific parameters necessary to safeguard judges from conditions conducive to corruption and strengthen their capacity to counter and combat all manifestations of judicial corruption. She also noted that a judiciary whose independence is

not firmly institutionalized and adequately protected can easily be corrupted or co-opted by interests other than those of applying the law in a fair and impartial manner.

3. Independence of lawyers and the legal profession

46. In the first report, the Special Rapporteur stated that he would be vigilant with regard to the protection of the important role of lawyers and their respective bar associations in upholding human rights and fundamental freedoms. In this context, he made an important distinction between engagement in the protection of human rights which have political connotations, and engagement in politics per se (see E/CN.4/1995/39, para. 72).

47. The Special Rapporteur acknowledges the importance of the standards set out in the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors. He will give special attention to this matter, and takes the opportunity to call on all bar associations and lawyers' organizations to adopt the same course of action. The Special Rapporteur wishes to express his support for and endorsement of all the actions that can be implemented to this end.

Safeguards for the protection of lawyers

48. As far back as 1998, the Special Rapporteur had already noted a constant concern that had been expressed about the increased number of complaints concerning Governments' identification of lawyers with their clients or their clients' causes, especially lawyers representing the accused in politically sensitive cases. Identifying lawyers with their clients' causes could be construed in many circumstances as intimidation and harassment, against which Governments have an obligation to protect lawyers (see E/CN.4/1998/39, para. 179).

49. The Special Rapporteur later declared that he would also pay particular attention to any attempt to suppress or restrict the independent operation of bar associations, as had been expressed in previous reports (see E/CN.4/2004/60, para. 46).

50. Previous mandate holders identified prerequisites and safeguards that are essential for lawyers to freely and effectively discharge their professional functions (A/64/181); looked in detail into the provision of legal aid (A/HRC/23/43 and Corr.1); and addressed again the importance of protecting the independence of lawyers and the legal profession (A/71/348). Besides looking into the fundamental role of lawyers in providing access to justice and the right to have access to a lawyer, the Special Rapporteur also looked into the necessary safeguards for the professional functions of lawyers and their security and important aspects of the organization of the legal profession.

4. Special circumstances giving rise to violations of the independence of judges and lawyers and the proper administration of justice

Reasons of State and the protection of national security

51. In the first report, the Special Rapporteur declared that restrictions to judicial independence based on "reasons of State", including national security, should be carefully scrutinized and clear limits established. He noted the importance of avoiding the excessive usage of the prerogatives conferred on governmental authorities (see E/CN.4/1995/39, para. 58). A subsequent mandate holder noted that he would continue paying attention to States where laws allowed the executive to order the detention of persons suspected of conspiring or intending to conspire against national security and to keep them detained without charge or trial, sometimes in secret and even without access to any judicial remedy or to counsel (see E/CN.4/2004/60, para. 55).

Counter-terrorism

52. Several reports and jurisprudence from international human rights bodies have underlined the problems that certain anti-terrorism measures may present for judicial independence and the independence of the legal profession. The use of "faceless" judges, secret witnesses and limitations on the presentation and use of evidence are examples of measures that affect the independence of the judiciary, restrict the defendant's right of due

process and violate the right to a fair trial in a systematic way (see E/CN.4/1996/37, paras. 66-77).

53. In 1998, the Special Rapporteur noted an increase in complaints of Governments' non-compliance with internationally accepted standards of due process particularly in terrorist-related crimes, raising questions concerning the integrity, independence and impartiality of the courts (see E/CN.4/1998/39, para. 182). Following the terrorist attacks in the United States on 11 September 2001, the Special Rapporteur announced that he would give careful attention to the effects any measures taken by Governments might have on the respect for the rule of law and the proper administration of justice (see E/CN.4/2002/72, para. 28).

54. The Special Rapporteur later indicated that complaints concerning the failure of Governments to respect internationally accepted judicial guarantees in terrorism-related crimes were constantly increasing. Concerns about the repercussions of counter-terrorism measures on respect for legality were also increasing (see E/CN.4/2004/60, para. 58).

States of emergency

55. In several reports, the Special Rapporteur expressed concerns in relation to judicial independence in states of emergency, noting that decrees instituting states of emergency were often followed by mass dismissals of judges, the creation of special courts and the restriction or suspension of the judicial review function (see E/CN.4/1995/39, para. 59).

56. Even during a state of emergency, the rule of law must be respected. The Special Rapporteur said, in particular, that there should be no prolonged detentions without trial, that all detainees should have access to a legal representative and should have the right to have the lawfulness of their detention reviewed by an independent court (see E/CN.4/2002/72, para. 28; see also A/HRC/4/25).

Military justice and special courts

57. As early as the first report, the Special Rapporteur expressed concerns regarding military courts, revolutionary courts or similar special courts, noting that the criterion of independence was not always assured (see E/CN.4/1995/39, para. 57).

58. The setting up of parallel courts to deal with terrorist-related offences has been mentioned as a matter of concern (see E/CN.4/2003/65, para. 39), since in several circumstances these courts' composition and procedures are often far from complying with the requirements of article 14 of the International Covenant on Civil and Political Rights (see E/CN.4/2004/60, para. 54).

59. The successive mandate holders have focused considerable attention on the question of the military justice system and the establishment of special courts, in particular for the trial of terrorism-related cases, in their reports to the Commission on Human Rights and the Human Rights Council (E/CN.4/2004/60, E/CN.4/2005/60, A/HRC/8/4, A/HRC/11/41 and A/HRC/20/19) and the General Assembly (A/61/384, A/62/207, A/63/271, A/68/285 and A/70/263).

5. Equality before the courts

60. An essential component of the right to access to justice, the right to equality before the courts has been largely addressed by the Special Rapporteur (see, for instance, A/HRC/8/4, para. 20, A/66/289 and A/70/263, paras. 74-84). Fulfilling this provision requires States not only to prohibit de jure or de facto distinction in accessing courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds, but also to take positive measures to ensure that no human being is deprived of his or her right to claim justice.

Women in the justice system

61. The Special Rapporteur has consistently paid particular attention to the relationship between gender and the judiciary, underscoring the problems that women have to face in some countries to enter the judiciary; pointing out the difficulties that arise in some places

when women want to exercise their rights before the courts; stating that impunity for certain kinds of crime, particularly sex-related crimes, is a source of obvious discrimination and an obstruction with regard to the exercise of the right of access to justice (see A/HRC/8/4, para. 51); and identifying the need to implement and coordinate within the State a range of processes, mechanisms, laws and policies in order to achieve a gender-sensitive judiciary.

62. In 2011, the Special Rapporteur identified the conditions under which a gender-sensitive judiciary could be developed and how the judiciary could foster women's human rights (A/HRC/17/30 and Corr.1). She further addressed the necessity for setting up rules of procedure and guarantees that are gender-sensitive in order to ensure the equality of women before the courts, and noted that women must benefit from the right to a fair trial and equality before the courts without discrimination based on their gender (A/66/289).

63. The system of administration of justice has a crucial role to play in relation to the effective protection of women's human rights, the empowerment and development of women and the advancement of gender equality (see A/HRC/17/30 and Corr.1, para. 82).

Children in the justice system

64. In 2004, the Special Rapporteur noted that special attention had to be paid to the administration of justice in the case of children, in particular children in conflict with the law, noting that minors should enjoy at least the same guarantees and protection as adults pursuant to article 14 of the International Covenant on Civil and Political Rights (see E/CN.4/2004/60, para. 51).

65. In 2015, the Special Rapporteur devoted a full report to the issue of children in the justice system (A/HRC/29/26 and Corr.1). She looked at the protection of children's rights in the justice system and analysed the essential role that must be played by judges, prosecutors and lawyers in upholding children's human rights and applying international human rights norms, standards and principles at the domestic level. She concluded that investing in child-sensitive justice is indispensable to strengthening the rule of law and the enjoyment of human rights by all, as well as to building flourishing democratic societies (ibid., para. 2).

66. The Special Rapporteur further underlined that in all decisions relating to children, including in the context of the administration of justice, the best interest of the child must be paramount. This statement not only implies that children have special rights, but also that their needs and interests must be given primary consideration in all the aspects of the justice system.

6. Access to justice and legal aid

67. The Special Rapporteur has dedicated extensive work to the issue of access to justice and, more particularly, legal aid (see, for instance, A/62/207, A/HRC/8/4, A/HRC/14/26, A/HRC/17/30 and Corr.1, A/69/294 and A/HRC/29/26 and Corr.1). In 2014, the Special Rapporteur demonstrated the need to integrate the concept of the rule of law, including access to justice, into the post-2015 development agenda (A/69/294). She noted that access to justice is a legally complex issue because it constitutes both the means for realizing and restoring rights, but is also a fundamental human right in itself. On the issue of legal aid more particularly, the Special Rapporteur strongly advocated for legal aid to be available to all individuals engaged with the justice system as its aim is to contribute to the elimination of obstacles that impair equal access to justice (A/HRC/23/43).

7. Education, training and capacity-building of judges, lawyers and prosecutors

68. The need for high-quality education and continuing training of judges, prosecutors and lawyers was highlighted in a series of reports over the years (see, for instance, A/HRC/11/41, A/HRC/14/26, A/65/274, A/66/289, A/HRC/20/19, A/HRC/20/20, A/HRC/29/26 and Corr.1 and A/71/348). Proper administration of justice requires judges, lawyers and prosecutors to have a solid legal training, including on-the-job training that takes account of the most recent developments in law and national jurisprudence and covers, inter alia, international human rights standards and principles, international

humanitarian law and international law on refugees, international criminal law and the principles of national and international professional ethics.

C. Specific issues of concern

69. The current mandate holder has identified four broad areas of concern related to his mandate: judicial independence; corruption, organized crime and the independence of judges and lawyers; protection of the legal profession; and restrictions to the right to a fair trial and due process of law.

1. Guaranteeing judicial independence

Interference in, pressures on and threats against the judiciary

70. The independence of the judiciary is linked to the lack of interference in, pressures on and threats against the judiciary. To ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgments and decisions. Otherwise, the independence of the judicial system would be seriously jeopardized, as its practitioners would not be able to fulfil their tasks in an objective and independent manner.

71. Principles 2 and 4 of the Basic Principles on the Independence of the Judiciary mention the requirement of non-interference in order to guarantee the independence of the judiciary. Such lack of interference implies that no authority, private group or individual may interfere in judicial decisions; they must respect and abide by the decisions of the judiciary. Judges shall decide matters presented before them not only impartially and in accordance with the law, but without threats or interference. The decision-making process can be assured only if there is no inappropriate or unwarranted interference with the judicial process.

72. The Special Rapporteur would like to stress the importance of protecting the judiciary and the legal professions from interference and pressures in order to protect human rights. As stated by Louis Joinet in 1993, fundamental freedoms are all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure (see E/CN.4/Sub.2/1993/25, para. 1).

Role of the media

73. Freedom of the press constitutes an essential element of freedom of expression, and is enshrined in many international instruments and national constitutions. A free and independent press fosters a better-informed society with the capacity to constructively question government authority, thereby preventing abuses of power. According to the Madrid Principles on the Relationship between the Media and Judicial Independence, both the media and the judiciary have a shared responsibility to guarantee freedom of the media and independence of the judiciary. The judicial system, for its part, has to guarantee the existence of a free and independent media. On the other hand, the media have an obligation to respect the rights of individuals, protected by the International Covenant on Civil and Political Rights, and the independence of the judiciary.

74. From the outset, the Special Rapporteur has relayed increasing concerns about the complex relationships between the media and the judiciary. For instance, the Special Rapporteur worried about the critical issue of how extensive media coverage could affect a fair and impartial trial, an issue that may be even more relevant with the advent of the Internet and social media. He stressed that a fine balance had to be struck between the right of the "consumers" of justice to a fair and impartial trial and the equally important right to freedom of expression and the corresponding right to information (see E/CN.4/1996/37, [illegible]).

2. Corruption, judicial accountability and the independence the justice system

75. The Special Rapporteur wishes to highlight how corruption affects the respect for and the protection of human rights, and calls on States to prioritize this issue. Being free from official corruption must be "a fundamental obligation that governments owe to every individual by virtue of being human, that trumps other policy considerations, and the violation of which is a grave affront to justice".[4] Thus, corruption should not only be understood as affecting human rights, but also as a human rights violation in itself. The impact of corruption on the realization of human rights depends not only on the forms and severity of corruption, but also on its pervasiveness. Corruption is an obstacle to the realization of human rights in general and in specific cases it can also constitute a direct violation of specific human rights.

76. On the one hand, the existence of corruption in the judiciary directly undermines the rule of law and the ability of the judiciary to guarantee the protection of human rights. On the other, corruption can represent a very serious threat for judges, prosecutors, lawyers and other actors fighting against it and directly or indirectly impede the proper discharge of their professional functions. Systematic corruption enjoys impunity when institutions are unable to perform their functions. As mentioned by the Special Rapporteur, to effectively combat corruption support for the independence of the judicial system is crucial, as is the need for institutional and efficient security for all actors in the justice system, especially when dealing with cases of so-called grand corruption (see A/67/305, para. 4).

77. The Special Rapporteur will continue to pay special attention to the various manifestations of judicial corruption and the measures needed to fight it in line with international standards on judicial independence, as well as to the very serious challenges and threats faced by judges, lawyers, prosecutors and other legal professionals when confronting and combating corruption, and the safeguards that must be enforced to ensure their security and that they can carry out their duties independently.

78. The 2030 Agenda for Sustainable Development refers to the need to have institutions at all levels of State that can be held accountable. Furthermore, to assure the independence of judges and lawyers, it is not enough to have institutions that can be held accountable; it is also important that they appear to be accountable in the eyes of the society as a whole. As stated by Giuseppe Di Federico, "the role of judges is inextricably tied to a set of characteristics and values that are essential for the very legitimacy of the judicial function … as judges are expected to behave with honesty and propriety".[5]

79. Accountability is a concept inherent in the rule of law, which is at the heart of the principles promoted by the United Nations. The importance of accountability is also highlighted in article 1 (c) of the United Nations Convention against Corruption as a means to fight corruption. Within the judiciary, it implies the acceptance of responsibility by judges, prosecutors and lawyers for the failure to act according to the standards and principles that must be observed during the performance of their duties.

80. In a 2014 report (A/HRC/26/32), the Special Rapporteur set out a number of basic requirements for judicial accountability mechanisms to be put into practice:

- The relationship between the justice operator to be held accountable and the forum, body or institution to which he or she must respond needs to be clearly defined.
- The justice operator to be held accountable must have the means to properly explain and justify any conduct or action deemed inadequate, inappropriate or illegal through due process.
- The forum, body or institution exercising judicial accountability must be entitled to pose questions and assess whether the justice operator should face sanctions or not.

[4] Matthew Murray and Andrew Spalding, "Freedom from official corruption as a human right", in Governance Studies at *Brookings*, January 2015.

[5] "Judicial accountability and conduct: an overview", in Anja Seibert-Fohr, ed., *Judicial Independence in Transition*, 2012.

United Nations Convention against Corruption

81. The United Nations Convention against Corruption represents a major milestone in the fight against corruption. It introduces a comprehensive set of standards, measures and rules to strengthen the legal and regulatory regimes to fight corruption. Furthermore, it calls for preventive measures and the criminalization of the most prevalent forms of corruption in both the public and private sectors.

82. The preamble to the Convention underscores how corruption affects societies and countries across boundaries, calling on States to adopt measures to prevent and address the impact of organized crime. The Convention underlines the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law, warning about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering. It concludes that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.

83. Article 11 of the Convention emphasizes the crucial role of the judiciary in combating corruption and recognizes that, to play this role effectively, the judiciary itself must be free of corruption and its members must act with integrity. The Special Rapporteur will use the Convention as a guiding instrument throughout his future reporting on the topic, particularly with regard to the following issues: (a) the strengthening of the judiciary to prevent corruption opportunities; (b) the prosecution of bribery of public officials; (c) the removal of legal obstacles that constitute an obstruction of justice; (d) the adoption of norms to protect witnesses, experts and victims; (e) cooperation at the national and international levels; and (f) implementation of mutual legal assistance.

84. The judicial system must implement measures to defend itself against corruption while, at the same time, it has to fight decisively against this scourge at all levels in a holistic manner. That is one of the several reasons why the link between corruption, human rights and the actors within the justice system must be approached from a dual perspective. On the one hand, the direct threats that judges and lawyers are facing must be confronted. On the other hand, the challenges that corruption can pose must be analysed to strengthen capacities and determine how to combat corruption and organized crime effectively and more efficiently.

85. It is crucial that Member States, human rights organizations and other relevant stakeholders incorporate the principles enunciated in the Convention in their programmes and strategies and work towards the implementation of the Convention's obligations. In addition, entities of the United Nations system should work in closer cooperation to follow up on the implementation of the Convention. For instance, in 2016, the United Nations Office on Drugs and Crime launched a global programme on promoting a culture of lawfulness, which includes the establishment of a global judicial integrity network to exchange best practices and lessons learned on priority challenges and emerging issues with regard to judicial integrity and the prevention of corruption. The Special Rapporteur takes note of this initiative and looks forward to collaborating in the full implementation of this programme.

3. Protecting the legal profession

86. We must not, and cannot, lose sight of the fact that lawyers can face specific hazards as result of interference, pressures and threats, which may include physical, psychological and social abuses directed against them and their relatives. The Basic Principles on the Role of Lawyers are an essential instrument that must be implemented, respected and disseminated to guarantee the rights of the legal profession.

Lawyers at risk

87. In democratic systems, lawyers have a seminal role to play in ensuring that all citizens have adequate access to justice and reparations. The important and specific role of

lawyers in ensuring the efficient functioning of democracy and the enjoyment of human rights must be kept in mind.

88. However, lawyers can perform their professional functions without interference and impediments only if their independence is safeguarded. As expressed in the Basic Principles, States have a key role to play as guarantors of their independence and security.

89. Of particular importance is the duty of States to ensure the right to a fair trial and the respect for the presumption of innocence. The role of lawyers is crucial to assure this pillar of democracy, and States should foster an enabling environment to ensure that they can carry out their work impartially, objectively and professionally, without any external pressure or identification with their client's behaviour, activities or opinions. The Special Rapporteur takes note of the existing barriers and threats faced by lawyers around the world and will analyse this issue in future reports.

Role of bar associations

90. According to principle 23 of the Basic Principles on the Role of Lawyers, as citizens, lawyers are entitled to freedom of expression, belief, association and assembly. Moreover, principle 24 expressly establishes that lawyers are entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.

91. Taking the Basic Principles as reference, bar associations should assume the functions of upholding professional standards and ethics, protecting their members, providing legal services and cooperating with governmental and other institutions in furthering the ends of justice and the public interest.

92. The Basic Principles also refer to the independence of the legal profession and disciplinary proceedings (see in particular principles 26-29) as basic elements of the role of lawyers. Bar associations and lawyers' organizations provide the perfect platform for ensuring and defending the independence of lawyers and addressing allegations of interference through the collective action of its members. They are also responsible for ensuring that the work conducted under their umbrella is performed in accordance with the professional and ethical standards established by the bar associations. Principle 23 of the Basic Principles stipulate that lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

93. Professional organizations and/or bar associations are the institutions responsible for protecting professional integrity and enforcing disciplinary measures. Such proceedings should be transparent, impartial, fair and objective. As the Special Rapporteur has stated, such an organization would not only provide a mechanism of protection for its members against undue interference in their legal work, but also monitor and report on their members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner (see A/HRC/23/43/Add.1, para. 87).

4. Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal

Role of judges and lawyers with regard to pretrial detention and arbitrary detentions

94. It is the task of an independent judiciary to guarantee the enjoyment of the right not to be arbitrarily deprived of one's liberty. International human rights law establishes strict limits on the power of States to deprive human beings of personal liberty. The International Covenant on Civil and Political Rights establishes the prohibition of arbitrary arrest and detention. In a State that abides by human rights standards the infringement of these tenets can involve criminal and civil proceedings.

95. According to article 9 (3) of the International Covenant, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him and, if detained on a criminal charge, the detainee shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

96. The main role of judges when facing such situations is to permit the detainee to challenge the legality of the arrest and detention before a court of law. Judges must not only decide about the lawfulness of the detention; they have also to ensure that the person's fundamental rights have been respected.

Right of access to a lawyer

97. Any detainee or accused person has the right to have access to a lawyer without undue delay. It is the obligation of States to set out the necessary mechanisms to ensure that persons deprived of their liberty can effectively exercise their defence rights, including the access to a lawyer.

98. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems stipulate that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law.

99. Such a right is paramount in a State based on the rule of law. It guarantees the possibility for the detainee to rebut the evidence presented against him or her and act in the most favourable way for his or her interest.

Military courts and the right to a fair trial

100. Military courts tend to be structured within a hierarchical system of command and control. This creates a difficulty in conducting a fair and impartial trial. Military procedures carried out or influenced by corrupt officers create a general distrust in military courts on the part of civilian populations, as stated by Arne Willy Dahl at an expert consultation organized by the Office of the United Nations High Commissioner for Human Rights in 2014 (A/HRC/28/32). Such situations of bias and corruption result in a violation of article 14 of the International Covenant, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

101. The Special Rapporteur calls on States to adopt specific norms that expressly exclude civilians from investigation and prosecution by military tribunals, ensure that their jurisdiction is limited to military offences committed by active members of the military and protect the rights to fair trial and due process.

Role of the justice sector in states of emergency

102. States are responsible for providing effective domestic remedies before independent and impartial courts or authorities. Non-derogable rights must be protected in states of emergency, and under no measures of derogation should the efficacy of these remedies be allowed. As clarified by the Human Rights Committee in its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

103. According to article 14 (1) of the International Covenant, in the determination of any criminal charge against them, or of their rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. As indicated by the Human Rights Committee in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.

Role of the justice sector in conflict situations

104. In its resolution 9/10, the Human Rights Council outlined the need to promote the rule of law and to implement transitional justice mechanisms in conflict and post-conflict societies. The Justice and Security Programme of the United Nations Development Programme in Liberia has emphasized that these goals can be achieved by strengthening the judiciary as well as by empowering and developing the capacities of judges, lawyers and prosecutors to hold perpetrators to account, establish justice and combat impunity.

105. Judicial independence in conflict situations allows for a stronger separation between the judiciary and the State and ensures that trial proceedings are conducted in a fair and impartial manner. An independent judiciary will be better positioned to produce legal frameworks that adhere to and respect international human rights standards.

106. In a report to the Security Council, the Secretary-General highlighted the key issues and lessons affecting the promotion of justice in post-conflict societies. Prevention, legitimate structures for the peaceful settlement of disputes and the fair administration of justice are some of the key elements that should be taken into consideration when addressing this difficult situation. At this point, transitional justice, which aims at coping with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation, is essential to overcome the situations created by conflicts (see S/2004/616, para. 8).

Justice, reasons of State and protection of national security

107. The role of the justice sector in times of war — including when the central power is fighting local insurgencies — must take into consideration a basic set of rights that should be guaranteed, whatever the situation. It is for judges to interpret the law and safeguard the constitution without any improper influences or pressures. However, in armed conflicts the threat to judicial independence is heightened, with threats both internal and external.

108. The fundamental question is whether the role of the judiciary should change during armed conflicts, especially when national security interests are concerned. Courts may need to give State authorities special consideration during an armed conflict, when the State's interest in protecting the nation's security is highest. However, this does not change the core function of the judiciary. When balancing the interests of the Government against those of individuals, even if judges have to give greater weight to governmental interests that may be legitimate during times of war or severe internal strife, it is imperative for courts to control governmental power to guarantee the respect for the rule of law and the rights of citizens.

III. Conclusions and recommendations

109. **The present report establishes the main topics that the Special Rapporteur intends to address during the course of his tenure. He will pay special attention to issues of judicial independence, corruption and organized crime within the judiciary, the protection of the legal profession and the restrictions to the right to a fair trial and due process of law.**

A. Conclusions

1. Overview of the thematic work accomplished since the establishment of the mandate

110. **The approach of the successive mandate holders went much beyond analysing the judiciary from the standpoint of legislation; they looked into how the justice system actually functions, and strove to identify factors, whether social, economic or cultural, hindering genuine equal access to justice for all. The Special Rapporteur will follow this approach.**

2. Specific issues of concern

Guaranteeing judicial independence

111. The rule of law can be upheld only if there is an effective system of separation of powers, where the independence of the judiciary is effectively guaranteed. The Special Rapporteur underscores the need to strengthen norms that can allow for the judiciary to carry out its function independently.

112. Issues relating to the establishment and functioning of military courts lie at the core of the mandate of the Special Rapporteur on the independence of judges and lawyers.

113. The media can perform their work in an impartial manner only when certain conditions are met. Such an environment must be assured by the State through the guarantee of the freedom of expression and the respect of a free press. On the other hand, the media must be aware of their responsibility and ensure that the information delivered is accurate, professional, rigorous and respectful of the independence of the judiciary.

Corruption, organized crime and independence of judges and lawyers

114. It is essential that all Member States and relevant international and regional organizations and institutions include as a priority in their agenda the elaboration and implementation of measures to fight not only the consequences but also the underlying causes of corruption.

115. Corruption and organized crime are severely undermining the capacity of many States to promote systems of governance accountable to and compliant with human rights standards by diminishing the confidence of the citizens in the administration of justice.

116. One of the current challenges to investigating and sanctioning corruption around the world has to do with the proper functioning of the State apparatus. Institutions need to work adequately and in accordance with the rule of law and international standards so that they can guarantee their independence when it comes to preventing and punishing improper behaviour.

117. The Special Rapporteur would like to highlight the importance of international judicial cooperation in the fight against corruption by developing exchanges of good practice and pooling experiences. In this respect, the United Nations Convention against Corruption offers an appropriate legal framework for effective action and international cooperation. Indeed, one of the purposes of the Convention is to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption (art. 1 (b)).

118. Interferences, pressures and threats constitute significant risks to the independence of judges, which make them particularly vulnerable to corruption.

Protecting the legal profession

119. Bar associations, institutions that have a vital role to play in upholding professional standards and ethics, must assume their responsibilities in this respect and embrace both the Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers.

Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal

120. Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal cannot be understood from a single point of view. The Special Rapporteur acknowledges that these restrictions are part of a multiple set of behaviours that can put at risk the right to a fair trial. The

circumstances allowing the implementation of such restrictions must be exceptional and limited by law.

B. Recommendations

121. The Special Rapporteur encourages all Governments to cooperate with and assist him in the performance of his functions in accordance with Human Rights Council resolution 26/7.

122. States should ensure that the Special Rapporteur is able to perform his mandate within their jurisdiction. For that purpose, the Special Rapporteur requests that they not only facilitate his country visits, but also assist by providing information when requested and responding to communications within a reasonable period of time.

123. The Special Rapporteur believes that it is necessary to foster multilateral cooperation and coordination in order to correctly address the independence of judges and lawyers from a global perspective.

124. The Special Rapporteur wishes to highlight that he is available to assist States with the assessment of the implementation of international standards aimed at ensuring the independence of judges and lawyers.

125. The Special Rapporteur encourages civil society organizations, academia and other relevant stakeholders to submit information and to participate in relevant activities with a view to contributing to the fulfilment of his mandate.

126. The Special Rapporteur encourages other special rapporteurs and the United Nations, including its specialized agencies, to cooperate to the fullest extent possible with the expert in the fulfilment of his mandate.

127. The Special Rapporteur encourages all States, bar associations and lawyers' organizations to endorse the Basic Principles on the Role of Lawyers and to disseminate their content, so that they may be fully known by all authorities and members of the legal profession.

128. States should take all steps to ensure that international rules and standards aimed at dealing with the issues addressed in the present and subsequent reports are gradually integrated in domestic law and applied by domestic courts. For that purpose, it would be useful to set out the basis for an agenda to discuss the application of international law and jurisprudence in domestic courts.

129. In order to ensure respect for human rights, Governments must remove the obstacles that prevent the enjoyment of these rights. In this context, corruption and organized crime represent the biggest challenges to be taken into consideration.

130. Each State party to the United Nations Convention against Corruption should take measures to strengthen judicial integrity and to prevent opportunities for corruption among members of the judiciary.

131. It is the responsibility of States to ensure security and physical protection for all members of the legal profession in order to guarantee the independence of the judiciary. One of the priorities must be to set out a protocol that would allow detecting and dealing with such circumstances.